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COPY

November 29, 1989

Russell Armstrong
CANADIAN COMMITTEE AGAINST
CUSTOMS CENSORSHIP
335 Markham Street
Toronto, Ontario
M6G 2K8

Dear Russell:

Re: Glad Day Bookshop
Jearld Moldenhauer
C.C.A.C.C.

We have filed a suit in the Federal Court on behalf of Glad Day and Jearld Moldenhauer with respect to the failure (or refusal) by Customs to decide the appeals filed with respect to an assortment of imported material. Some of the material in question was intended to be the basis of a further test case on obscenity. At the time this was launched, it was with your concurrence as well as Jearld's with the expectation the Committee would adopt the action. Jearld agreed to be responsible for legal fees if all else failed. A copy of the Statement of Claim is attached for reference.

In the context of this suit, we brought a motion seeking an order for the immediate return of various materials about which the Minister had not made a decision for some six months, some of the material which had been detained for almost a year. The morning before the motion was to be argued, the Deputy Minister delivered the decision and the motion was abandoned with costs reserved to the trial judge.

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A) CONTINUED SUIT AGAINST DEPUTY MINISTER

We should consider whether to proceed with the main action under the Statement of Claim itself. The following significant procedural points might be argued:

1. SPEEDY DECISION

I believe we could win a declaration which provides that unless a speedy decision by the Department regarding alleged obscenity is made that materials should be released forthwith. The strong American authority supports the necessity of a very speedy prima facie judicial determination of obscenity to justify detention. The Deputy Minister is clearly in violation of these rules.

As you know after the Deputy Minister's decision there is an appeal to District Court and another long delay before the case is called in that court.

Whether we can go to the next step and win an argument that a speedy judicial determination also must be made by the District Court is an interesting question. I believe this is an equally sound Charter argument but one which will meet more resistance. It is an open question whether a decision about judicial speed would be an aspect of a Federal Court Declaration or something to be argued in District Court. If both these arguments succeed, and a quick prima facie judicial determination is required, it would effectively kill the customs censorship system because it would be impossible to administer.

I would like to proceed with this procedural argument.

2. DAMAGES

Jearld Moldenhauer advises that some $4,000.00 to $5,000.00 worth of magazines and books are under seizure. He is unsure whether or not they would be taken back by their American publishers at this stage or later after an obscenity trial. He is unsure whether or not they would be saleable in months or years after their release.

While not mentioned in the claim as drafted, the interruption of magazine deliveries to the store over the years has been quite costly. Jearld is considering adding this to the claim and continuing this portion of the action himself even after the sale of the store. We would have to work out the mechanics, but this is feasible.

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In addition to the actual damages, there ought to be an amount, $1,000.00 to $10,000.00 for general damages for breach of Charter rights. Again this is difficult to ascertain, because the law of Charter damages is undeveloped. Whether these damages belong to the store, Jearld or the C.C.A.C.C. as a sponsor of the litigation requires discussion.

3. SYSTEMIC DISCRIMINATION

The Statement of Claim alleges, in general language, the incapacity of the customs censorship system to make decisions regarding the rights of this client and specifically it alleges that the Department is biased against the gay community.

There is one core legal argument here that is relatively simple to make. It is that the existence of Criminal Code provisions regarding seizure and prosecution of obscene material make redundant, unnecessary and unjustifiable the system of customs censorship. The balance of the arguments regarding the incapacity of the Department to understand gay issues, etc., requires very substantial evidence. I am reluctant to proceed with that factual case unless very large financial resources were available.

B) COSTS AND BENEFITS

An award of damages for loss of profit should presumably benefit Jearld and perhaps the new owners of the bookstore. A favourable determination on the question of speed and systemic discrimination benefit the community as well as the bookstore. If we proceed with this action on all three fronts, an agreement should be reached between the Committee and the store regarding the division of legal expenses and obligations if costs are awarded against us.

If we lose there may be costs to pay to the successful Crown. The bookstore is more vulnerable on this than the Committee, which is penniless. (Committee members could personally be responsible if things were pushed, but this is not a very convenient collection mechanism). An agreement on this is also required.

C) CUSTOMS APPEALS - OBSCENITY

As a result of the decision we forced from the Minister, we now have a set of materials that are ready for an appeal to District Court. These materials include Meat Men comic books, Tom of Finland cartoon books and several books which are largely text made up of various stories, both personal and fictional.

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Further, we have at long last finally succeeded in getting customs to seize some of the "soft core" magazines. The December issue of In Touch, Advocate Men and Playguy have been detained and the appeal process has been set in motion. We have sent a letter demanding a speedy decision and citing our recent Application to the Federal Court and the Charter arguments noted therein.

Finally there has also been a more recent series of detentions of other material over the past two or three months which had not been appealed yet. At my request Jearld has filed Notices of Appeal with respect to this. This material includes Meat Men Five, an issue of Outlook, an issue of Oriental Guy, and several volumes of text, stories, a Phil Andros novel, etc.

From this large selection of material, we are now in a position to pick the items for which we would proceed with an appeal. This requires some careful discussion of the legal and political issues involved, not to mention costs.

Our choices range from the relatively soft core magazines to much more explicit "raunchy" cartoon books. With respect to the former the simple issue of anal sex can be isolated. The most difficult case would presumably be the cartoon books with rape and bondage fantasies. At the risk of overgeneralizing, my opinion is that the former can be won, the latter will not.

We should note that the very liberal decision from the Manitoba Supreme Court R v. Butler on the application of the Charter to the obscenity test was recently made. In it the court said that consensual sex could not violate the Charter standards of freedom of expression.

> "...I am unable to conclude that the depiction of the human body or any of its parts, no matter how explicitly presented, or the visual presentation of masturbation, group sex or other heterosexual or homosexual activity, including incestuous relations, prima facie relate to sufficiently specific concerns which are pressing and substantial in a free and democratic society to justify restricting or limiting the basic freedom permitting them to be expressed."

This reasoning presents many obvious and important opportunities for us. In addition to arguing the supposed "community standard" of decency, we will now have the court's hearing on the Charter issues of free speech. The decision gives legitimacy to issues I have always wanted to raise.

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We will have to discuss issues similar to those which arose in the Joy of Gay Sex case regarding experts. Something will have to be put on the record for the benefit of the court regarding the nature of gay sexuality. This will be especially important if this case proceeds in tandem with Butler to the Supreme Court of Canada. That court has repeatedly asked for better social science evidence on Charter issues. This is so especially where the Charter arguments concern that "effect" or the reasonableness of impugned legislation. While I can conceive of arguments that avoid these elements, I would expect the opposition or intervenors will present argument that catapults us into the realm of social science evaluation.

Finally the issue of costs with respect to an obscenity appeal should be discussed. Assuming the case proceeds, should we look to the bookstore or the Committee for any portion of the legal bill on this?

I am available to discuss these matters with the Committee in substantially more detail as required.

Sincerely,

Charles Campbell
CC:ck
Enclosure